Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996	)	
	)	CC Docket No. 96-238
Amendment of Rules Governing	)	
Procedures to Be Followed When	)	
Formal Complaints Are Filed Against	)	
Common Carriers	)	

COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

Introduction

The United States Telephone Association (USTA) submits these comments in response to the Notice of Proposed Rulemaking released by the FCC on November 27, 1996. As the principal trade association of the local exchange industry, USTA has a significant interest in the rules of practice and procedure governing complaints against common carriers.

The 1996 Telecommunications Act adds to the FCC's enforcement responsibilities and significantly shortens the deadlines for resolving most complaints against common carriers. In this proceeding, the Commission faces the difficult task of fashioning rules that result in a full and complete record for decision-making in a very compressed time frame. The twin goals of speed and completeness can sometimes conflict. USTA commends the FCC on proposing rules that, for the most part, balance these goals. That stated, USTA is concerned that a few portions of the rules within this NPRM may not comport with the ultimate goal of reaching full and fair

resolution on matters brought before the Commission. The FCC and the industry should not be satisfied with anything falling short of substantial justice.

I. The Pleadings and Discovery Process Should Move Parties to Fair Resolution

According to the Administrative Procedure Act ("APA"), "[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross examinations as may be required for a full and true disclosure of the facts."[1] Being covered by the APA, the Commission's rules for complaint adjudication should hold to this directive. Any new procedures proposed by the Commission must move parties toward fair dispute resolution while remaining open to the APA's general goal. Not only the APA, but other models employed for dispute resolution, such as the Federal Rules of Civil Procedure ("FRCP"), put great value on procedures which promote their ease of use, flexibility, and liberal application.

Regardless of what specific procedures are adopted, these can be no substitute for the early, active, and efficient involvement of the FCC staff that oversees the process. Not only does such involvement work to bring all parties to the table quickly and efficiently, but it also recognizes that "final decisions should be based on the merits rather than on procedural niceties."[2]

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[1] 5 U.S.C. § 556(d). Although this APA provision relates directly to adjudicatory hearings, USTA believes it is broadly applicable to the entire complaint process.

[2] See Federal Procedure, Lawyers Edition, § 62:261, Amendments Under FRCP 15 (a) ("Federal Procedure"); see also Reaves v. Sielaff, 382 F Supp 472 (ED PA 1974).

The Commission proposes that complainants should add to their complaints: (1) a complete and detailed explanation of the manner in which the defendant violated the Act; (2) relevant affidavits, documentation, and copies of all applicable agreements; (3) a certification of settlement attempts; (4) a copy, description, and location of all data and/or tangible things relevant to the dispute; and (5) a completed "Intake Form."[3]

Given the short time frames for resolution of complaints and the very limited discovery permitted even under current rules, the Commission is absolutely right to encourage complainants to provide as much detail as possible in the initial filing. In particular, the certification of settlement attempts is a vital addition that must be taken seriously by the parties and FCC staff. USTA's members' experience in this regard matches that described in the Notice: many times, the parties reach resolution if required to discuss settlement. Because these pre-filing settlement discussions are so critical, the Commission should consider requiring additional substance in the certification, setting out the actual steps the parties have taken to try to resolve the claim.

The Commission has tentatively concluded that while its proposals may impose higher initial costs on parties, such costs will be offset by more expeditious outcomes.[4] Although this is an admirable goal, USTA is troubled that these "higher initial costs" may act to deter the resolution of claims based upon their merits, particularly if a small carrier or other entity with limited resources is involved. Admittedly, the Commission has also proposed "good cause"

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[3]See generally, Appendix A, § 1.721; cf. 47 C.F.R. § 1.721.

[4]See NPRM at ¶ 44.

waivers, based upon financial hardship or other public interest showings, to alleviate some of these concerns.[5] The Commission should also consider including suggested content - even suggested formats - as an appendix to the rules to give parties a very concrete idea of what is expected. If the Commission lacks sufficient experience now with the new rules, it should consider issuing guidelines within a year. Adding such models and examples to the rules would help strike the proper balance between more detail and additional burdens on the parties.

The Commission proposes to shorten the time for answering complaints from 30 days to 20 days. Again, given the compressed time frames, this change is probably inevitable. The Commission should remember, however, that defendants do not have nearly the same length of time as complainants to research and prepare their pleadings. (Complainants, after all, are able to choose when to begin the process via their initial filing.) The situation for defendants is exacerbated by the proposal to prohibit any pleading amendments. The use of amendments can give parties the ability to include items that have arisen before the date of the original pleading, but were either unknown or left out when the pleading was first served.[6] "The liberal allowance of amendments to pleadings is a recognition that controversies should be decided on the merits whenever practicable."[7] Given the different situation faced by defendants, the FCC should consider allowing (as of right) one amendment to the answer to give defendants the opportunity to place on the record additional, pertinent information collected after the first 20 days.

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[5]See id; see also Appendix A, § 1.721(c).

[6]See Federal Procedure at § 62:261.

[7]See Federal Procedure at § 62:274; see also United States v. New York, 82 FRD 2 (ND NY 1978).

The Notice proposes to eliminate all discovery as of right. The FCC should consider going only "half-way" at this time, and allowing 15 interrogatories in place of today's limit of 30. The Commission presently has ample control to direct the scope and timing of such discovery through discretionary status conferences.[8] Thus, calls by the Commission to "maximize staff control over the discovery process,"[9] (either by prohibiting it as a matter of right, or greatly limiting it subject to staff discretion) must not subvert the search for answers to the constraints of time. To the extent that discovery is necessary, the Commission should remain amenable to such reasonable requests, willing to make tough calls where justice so demands. This "hands-on" involvement by staff is the only way to ensure the discovery process works effectively and is not subject to abuse.

II. Several of the Proposals in the Notice Have Significant Merit

USTA concurs with the Commission's proposals regarding bifurcation of liability and damages. Although parties can plead damages through supplemental complaints,[10] the proposed rules clarify the process of deferring adjudication on damages until after liability has been determined.[11] Where parties agree, Commission ALJs will be allowed to step in and mediate the

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[8] 47 C.F.R. § 1.733.

[9] NPRM at ¶ 49.

[10] 47 C.F.R. § 1.722(b).

[11] See NPRM at ¶ 64; see also Appendix A, §§ 1.722 (c), (d).

amount of damages owed.[12] Provided this proposal is enough incentive for parties to enter into bifurcated settings, it will go a long way in saving valuable time and expense for all involved while meeting statutory time frames.

USTA also finds a great deal of merit in the Commission's proposal seeking to establish a voluntary industry committee which could expedite (or even resolve) disputes before they are brought to the Commission.[13] Not only would this decrease litigation expenses, but also this neutral committee would serve the additional purpose of limiting government involvement while reducing the number and/or narrowing the scope of issues coming before the Commission for resolution. In particular, a less formal process might benefit smaller carriers and complainants who might be able to use it without hiring counsel and expending the other resources required in the formal process. However, it is important that the informal process be voluntary.

Finally, USTA applauds the Commission's continued efforts in bringing the FCC into the information age. More specifically, these efforts include: (1) the use of overnight delivery and/or fax service for pleadings;[14] (2) the establishment of an Internet directory of service agents for carriers;[15] (3) the employment of formatted computer disks for ready incorporation of proposed orders into Commission documents;[16] (4) the use of tape recording media to record the

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[12]See Appendix A, § 1.722(d)(1); see also NPRM at ¶ 67 (proposing a "limited period during which the parties could engage in settlement negotiations or submit their claims to voluntary alternative dispute resolution mechanisms in lieu of further [FCC] proceedings.").

[13]See NPRM at ¶ 29.

[14]See id. at ¶ 35.

[15]See id. at ¶ 33.

[16]See id. at ¶ 41; see also Appendix A, § 1.734(d).

Commission's oral orders within status conferences;[17] and (5) the direct service of complaints by the complainant on the defendant.[18] These proposals will all serve to make the complaint process more efficient and are inexpensive ways in which to hasten the resolution of complaints for all parties involved.

Conclusion

USTA applauds the thoughtful efforts of the FCC to update its complaint procedures. But we ask that the Commission modify its proposals as suggested in these comments.

Respectfully submitted,

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[17]See NPRM at ¶ 59; see also Appendix A, § 1.733(c).

[18]See NPRM at ¶ 31; see also Appendix A, § 1.735(d).